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THE NEW ENGLISH WAR CABINET AS A CONSTITUTIONAL EXPERIMENT

SOME few among the numerous readers of the HARVARD LAW REVIEW may have noted the creation in England on December 11, 1916, of a so-called War Cabinet consisting of only five persons, namely, Mr. Lloyd George (the Prime Minister), Mr. Bonar Law (the Chancellor of the Exchequer), Lord Curzon (the Lord President of the Council), Mr. Henderson and Lord Milner, who sit in the Cabinet but hold no definite office. My aim in this article is to show that this War Cabinet of five persons is a new and very interesting attempt to form a new kind of Cabinet government which, it is hoped, may turn out specially adapted to the conduct of the war, and thereby ensure the victory of Great Britain and her Allies. This experiment in constitutional government deserves the attention of persons still interested in the development of the English Constitution. They are, I fear, both in England and in the United States, not only a limited but a constantly decreasing class of students. To this small body I myself assuredly belong. It is impossible for me to conceal from your readers that I am both in age and in my mode of thought an old Mid-Victorian who still believes that the possession of a good constitution does somewhat contribute to, though it cannot ensure, the prosperity of a nation, and that changes in the old and at one time admired Constitution of England are worth being studied by the citizens of the American Commonwealth. Let me add that in this article it is my wish to write in the spirit of a constitutionalist and not of an English politician.

Whoever wishes to understand the constitutional experiment now

being carried out in England will do well to consider, first, the nature of Cabinet government as analysed by Bagehot in 1867; secondly, the peculiar characteristics of the present War Cabinet, and especially its difference from the old Cabinets on which it is based Bagehot's account of Cabinet government; and, lastly, the possible effects of the new form of Cabinet government.

CABINET GOVERNMENT AS ANALYSED BY BAGEHOT¹

The originality of Bagehot's book lies in one fact: he therein gives a picture of the English Constitution as it actually existed and worked — one may say lived — before his eyes some fifty years ago. He thereby discovered once and for all two conclusions which had escaped the attention of historians, such as Hallam, and are absolutely inconsistent with the constitutional doctrines of so high an authority as Blackstone. The one conclusion is that "the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers"; the second is that this fusion of the Government and the Legislature is achieved through the existence of the Cabinet. Let me therefore sum up the leading features of Bagehot's now universally accepted doctrine as to the nature, the appointment, the functions, the power of the English Cabinet and as to the beneficial effect of Cabinet government. But let my readers carefully bear in mind that Bagehot's masterly description of Cabinet government is based upon his subtle observation of Cabinets as they existed during the Mid-Victorian, we might almost say during the Palmerstonian, era, extending from say 1846 to 1866. The lessons to be learned from the events of these twenty years are supplemented in Bagehot's case by careful study of parliamentary history, at any rate from 1830. But for the full appreciation of Bagehot's genius and the right application of his teaching it must not be forgotten that in 1867, when his work was published, he naturally failed to note some constitutional changes which then were only just coming into view, and inevitably could not anticipate events, such for example as the immense development of the Party

¹ See BAGEHOT, *THE ENGLISH CONSTITUTION*, ed. 1878, No. 1, *The Cabinet*, pp. 1-32; No. 5, *The House of Commons*, pp. 130-175; No. 6, *On Changes of Ministry*, pp. 176-218; No. 8, *Prerequisites of Cabinet Government*, pp. 254-271.

system, or one may say of the "Machine," which has taken place in England since his death.²

The Cabinet, according to Bagehot, consists of all the highest officials who hold office during the King's pleasure, and are technically appointed by and dismissible at the pleasure of the King. They are the heads of all the great departments of government, such as the Lord Chancellor, the Secretaries of State, *e. g.* for Foreign Affairs, the Chancellor of the Exchequer, and the like. It is true that occasionally a member of the Cabinet might hold no definite office. All the members of the Cabinet are Privy Councillors. They all, according to Bagehot's description, are members of one or other House of Parliament. At the head of the Cabinet stands the Prime Minister.³ As some Minister must always be responsible for acts done by the King, the exercise of the Royal Prerogative for practical purposes lies in the hands of the Cabinet. The Cabinet therefore is the true English Executive.⁴

This being granted, the matter of supreme importance is the mode in which the Cabinet is appointed. Technically the members of the Cabinet are each and all nominated, as they are also dismissible, by the King; they are the "King's servants." But in reality they are, as Bagehot insists, selected by the Prime Minister or, in other words, by the statesman authorised by the King to form a Cabinet. They are always selected from the leading members of either House of Parliament, and are of necessity persons of influence in one or other of the Houses, who can, with the Prime

² In 1872 his introduction to the second edition of his book clearly shows his perception that the changed circumstances of the time were rendering some parts of his work obsolete.

³ In Bagehot's time the Prime Minister had, as such, no legally recognised title. He was really unknown to the Constitution. He was ordinarily the First Lord of the Treasury, an office which left him free to devote himself to his duties as Premier. But he might, as in the case of Pitt, as also of Gladstone, hold the office of Chancellor of the Exchequer, which would increase both his labours and his power.

⁴ Bagehot, in parts of his book with which I am not here concerned, is careful to show the real and important influence of the Crown, though probably his language a little underrates the power of the King, and still more overlooks the increase in that power which may arise from changing circumstances, *e. g.* the increasing feeling throughout the British Empire of Imperial unity.

The Cabinets of fifty years ago generally consisted of about fourteen or fifteen persons. The number of Cabinet Ministers varied from time to time, but it gradually, though not continuously, increased. Thus in 1891 it had risen to seventeen; in 1895 to nineteen; in 1914 (at the beginning of the war) to twenty-two; in June, 1915 (the Coalition Government) to twenty-six.

Minister, "command the support of Parliament," to use popular expressions, though in fact what in general is really meant is the support of the House of Commons, or a majority thereof. To put the same thing in other words, the Prime Minister and the members of the Cabinet are the leaders of the party which forms the majority of the House of Commons. The next point to note is that the effect of true Cabinet government, wherever it exists, and now the avowed object of Cabinet government in England, is to establish that fusion of the Executive and the Legislature which is in Bagehot's eyes the extraordinary merit of the English Constitution, and that this end is attained by the selection of members of the Cabinet from among the parliamentary leaders of the party which commands the support of Parliament.⁵

Consider now the functions of the Cabinet. They may be described as the exercise of every kind of power which can belong to a strong Executive, and especially the right to propose and generally to carry any legislation deemed desirable, or at any rate necessary, by the Cabinet.⁶ To one special power of our Executive Bagehot calls special attention:

"It is a committee which can dissolve the assembly which appointed it; it is a committee with a suspensive veto — a committee with a power of appeal."

The Cabinet therefore is, to use Bagehot's expressions, "a combining committee — a hyphen which joins, a buckle which fastens, the legislative part of the State to the Executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other."

⁵ Bagehot is aware of the importance of the difference between selection and election., Selection by the Prime Minister pretty well secures that he will and must choose as colleagues in the Cabinet the most eminent members of the Legislature who belong to the dominant party, of which he will be presumably the chief. Election to the Cabinet either by the two Houses of Parliament sitting together, or by the electorate of the United Kingdom, would probably in many cases have the result of placing in office not the candidate who had the greater number of ardent supporters, but the candidate who would on the whole excite the least opposition among the persons called upon to elect him. This at least is the conclusion a foreign critic is tempted to draw from the character of the Presidents of the Third French Republic who are elected by the two Houses of Parliament sitting together, and from the character of many of the American Presidents elected before the election of Lincoln.

⁶ A private member can still introduce a Bill into Parliament, but his power of passing it through Parliament without the aid of the Government amounts, it is said, at the present day almost to nothing. Since the beginning of the war the authority given to legislation by means of Orders in Council places something very like unlimited legislative authority in the hands of the Cabinet.

But it is much more than this; it links together not only the Executive and the Legislature, but also in a great measure the Government, the Legislature, and the Electorate, or in popular language the people. In any case the

"English system therefore is not an absorption of the executive power by the legislative power, it is the fusion of the two. Either the Cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creator."

It is worth noting that the want of this power of dissolution produced singular and not always beneficial results on the working of Republican institutions in France. It can hardly be doubted, as Bagehot when quite a young man had the acuteness to discover, that in 1851 the French people desired the re-election of Louis Napoleon as President. The legislative assembly of that day could not be dissolved before the expiration of the term for which it was elected. A majority of the Assembly, if my memory does not deceive me, were willing to pass a law changing the Constitution which should make the President re-eligible, but this majority was not as large as the terms of the Constitution required. An appeal to the electors through a dissolution was impossible. It is at least, however, conceivable that such an appeal would have met the wish of the country, and by giving to Louis Napoleon a new term of office would have deprived him of the excuse, and possibly of the wish, for the *coup d'état* of the 2nd December, which in effect, though not immediately in form, changed a democratic Republic into a despotic Empire. Under the third Republic a dissolution is legally possible,⁷ but it has never but once taken place, and the result of the precedent then set deprives it of authority. When Gambetta was Prime Minister and at the height of his popularity, the want of a right on his part to demand a dissolution prevented him from continuing at the head of the Government.

To Cabinet government, as it existed in England fifty years ago, Bagehot ascribes and, in the main with truth, some pre-eminent

⁷ A dissolution under the Third French Republic can take place only on the action of the President on the advice of the Senate. See Law of 25 Feb. 1875, s. 5.

"5. Le Président de la République peut, sur l'avis conforme du Sénat, dissoudre la Chambre des députés avant l'expiration légale de son mandat. — En ce cas, les collèges électoraux sont convoqués pour de nouvelles élections dans le délai de trois mois."

merits; he clearly holds it to be the best form of executive for any State which in reality enjoys a representative legislature. To him it is an instrument of government which works simply, easily, and effectively; the fusion which it creates between the Cabinet and the Legislature really increases the strength both of Parliament and of the Executive, and further, because legislation in England is so closely connected with the tenure of high office, keeps alive the interest of the people in the otherwise dull business of passing of Acts of Parliament. The Cabinet in his eyes again, by giving actual and exciting importance to parliamentary debate, is the educator of public opinion, whilst the Houses of Parliament, and especially the House of Commons, will be found to constitute the very best body conceivable for selecting the members of the Government; for every one of the men chosen by the Prime Minister to occupy a seat in the Cabinet must be a person well known to one of the two Houses, and probably to both; he must be a man of more than average talent, since, either by the gift of nature or by careful study, he has obtained the power of leadership among men, such as are Members of Parliament who have got to know both the strength and the weaknesses of their fellows. Cabinet government further, though it is a slow product of the complicated and exceptional history of England, and though it is favoured and strengthened by the traditional greatness and the living influence belonging to an English King, is a form of executive which in its essential characteristics can, if its nature be properly understood, be created in countries where no art of legislation can create a constitutional monarchy such as that which has grown up in England. Cabinet government, lastly, as Bagehot always implies, has the transcendent recommendation that it provides the most flexible form of executive which can be now found in any civilized State. Bagehot's belief in the excellence of Cabinet government is tempered by the soundness of his good sense and the acuteness of his insight with regard to all matters that came under his thoughtful observation. The very existence of the new constitutional experiment to which I am calling your readers' attention shows how justly Bagehot attributed flexibility to the English Cabinet. The Constitution of the Third French Republic, which has now stood the terrible test of time and has existed for more than forty years, proves decisively that a form of true Cabinet government may exist under Republican

institutions, and the annals of the five British Dominions show that the dignity and the prestige of the British monarchy are not essential to the maintenance of the power and the effectiveness of Cabinet government. So extraordinary is the genius of Bagehot that one hardly likes to dwell on the limitations within which his conclusions with regard to the English Constitution can now be accepted as altogether correct. Still they must be taken into account in order to make a fair comparison between the Cabinet government of 1867 and the new form of English Cabinet existing at least for the present in 1917. Bagehot seems to have given little study to the constitutions of foreign countries. He did not know what he certainly might have known, the singular and very successful attempt made in Switzerland to form an executive which, though appointed by the Houses of the Swiss Parliament, cannot be dismissed from office during the period (three years) for which the Council or Cabinet is elected. He had turned his mind towards the Presidential government of the United States. He perceived keenly some of its undeniable defects. But oddly enough the success with which Lincoln guided his countrymen through the perils of the Civil War hardly seems to have excited Bagehot's attention. He does not at any rate realise that at a crisis of a nation's history an elected but irremovable President may exercise a salutary power hardly to be obtained by a Prime Minister whose official existence depends at every moment on the will or the caprice of an elected legislature. It is somewhat singular too that Bagehot hardly notes the distinction, which has now become of great consequence, between the Cabinet which constitutes the real Executive and the large and constantly increasing body of Ministers who though not part of the Cabinet may hold offices of high importance and who lose, or may lose, office when the Cabinet ceases to command the support of Parliament.

In 1872 Bagehot, as appears from the second edition of his book,⁸ foresaw that his account of the English Constitution was, owing to the advance of democracy, becoming more or less obsolete. He obviously could not by any possibility anticipate the decline in the authority of Benthamite liberalism which did not become easily noticeable till at least twenty years after his death, nor the extent

⁸ Which should always be supplemented by the perusal of Lowell's "Government of England," and especially of Part II which treats of the Party System.

to which the disbelief in *laissez faire* has stimulated the influence of Socialistic ideals. Still less could he foresee the immense effect which in one form or another is being already produced on the public opinion of the civilized world by the attempt to establish by force of arms the military despotism of Prussia throughout the civilized world. Still, whatever limitations must be placed upon our complete acceptance of Bagehot's constitutional doctrines, owing in the main to the effect of events which have taken place since his "English Constitution" was first published, he has drawn the truest picture anywhere to be found of English Cabinet government as it existed fifty years ago and as it was assumed, not with perfect truth, to work up to almost the end of last year. It is therefore with Cabinet government as described by Bagehot we had best compare the new English Executive of to-day.

THE WAR CABINET OF DECEMBER, 1916

This Cabinet is characterised by the following features:

(1) It consists of only five members. This Cabinet is smaller than any Cabinet known, I believe, to English history since Cabinet government came into existence.

The Cabinet is however a real Cabinet; it is understood to be the real executive which ultimately exercises the final decision as to any executive act, and of course is in a parliamentary sense responsible for the whole action of the executive.

(2) The Cabinet is itself a war committee charged specially with the conduct of the war, though one of its members, namely, the Chancellor of the Exchequer, who also undertakes to a great extent the leadership of the House of Commons, is not expected to attend the Cabinet meetings regularly.

(3) The smallness of the Cabinet is combined with the large number of other Ministers who have not seats in the Cabinet. These number at least twenty-eight.⁹

(4) The result is that the Cabinet, strictly speaking, and as contrasted with the Ministry, does not include most of the holders of the principal offices which have hitherto entitled a Minister to a

⁹ If we reckon as Ministers every man who would in the usual course of events cease to be one of the Ministry on the Cabinet going out of office, the other Ministers number sixty-five.

seat in the Cabinet. Thus the Lord Chancellor, the Home Secretary, the Foreign Secretary, the Secretary for War, and in fact most of the highest officials, have no seat in the Cabinet. In other words, leading statesmen holding the highest offices, and men of the highest reputation, such as the Lord Chancellor (Lord Finlay), the Foreign Secretary (Mr. Balfour), the Secretary for India (Mr. Chamberlain), and most of the other experienced statesmen making part of the Ministry, are not Cabinet Ministers.

(5) A good number of the Ministry are experts in different lines who have been called to office not because of their reputation in the House of Commons, but because of their known capacity in the discharge of different kinds of business, as to which it is specially desirable that the nation should profit by a man's special training and capacity. Such for example are the President of the Local Government Board (Lord Rhondda), the Shipping Controller (Sir Joseph Maclay), and Dr. H. A. L. Fisher. All, or nearly all, I am told, of the Ministers who have been invited and induced to join the Ministry on account of their special capacity and talent, though it may happen to be of a non-parliamentary character, if they are not already members of the House of Lords, have or will become members of the House of Commons. But what specially needs to be noted is that access to the present Ministry has been lavishly opened to men who have displayed talent, capacity and character, outside the sphere of parliamentary life.

COMPARISON BETWEEN THE NEW WAR CABINET AND THE CABINET AS DESCRIBED BY BAGEHOT

- (1) The War Cabinet does not contain anything like all the most important officials of the Crown.
- (2) The War Cabinet, small though it be in number, contains men who have not risen mainly by their parliamentary talents.
- (3) The Ministers who do not belong to the Cabinet hold the greater number of the offices which used to give a title to a seat in the Cabinet. Among the members of the Ministry, though not of the Cabinet, are to be found men of high character and famed for their tried capacity in different lines of business, but who have been unknown to Parliament.
- (4) The Cabinet of not more than five persons is ultimately

responsible for the government of the country. Ministers outside the Cabinet are really, however great their fame and influence, not responsible for the general government of the country.

The essential difference between the Cabinet of to-day and every Cabinet which has preceded it may be thus summed up:

The new Cabinet does not contain anything like the whole body of high government officials or of the men who at the present moment are the parliamentary leaders of the party which commands a majority in the House of Commons, whilst the Ministers who are part of the Ministry, but are not part of the Cabinet, hold among them most of the high offices which till almost the end of last year entitled their holders to a seat in the Cabinet.

WHAT ARE LIKELY TO BE THE RESULTS OF THE NEW FORM OF CABINET?

We must here distinguish between the immediate and the ultimate effects of the new form of government.

As to the immediate effects. The new War Cabinet has obviously been created for the carrying on of the war against Germany with the utmost vigour. It is possible, one may even hope that it is likely, that the hopes of the nation will in this respect not be disappointed. Concentration of responsibility upon a few men trusted by the country is calculated in itself to increase the energy of the Government. Many Englishmen believe that already they can perceive new energy and boldness on the part of the new Executive. The one thing which is certain is that even the nominal management of the war by a Cabinet of twenty-two persons is an impossibility. If any one doubts this, the first pages of the First Report of the Dardanelles¹⁰ Commission are sufficient to banish such scepticism. The truth is that the War Cabinet is the admission of the fact, already widely suspected, that a large committee cannot direct the progress of a war, and that the nominal attempt to do so will inevitably throw the management, or mismanagement, into the hands of a much smaller body whose very names, except as members of the Cabinet, are unknown to the public.

The experiment of a small war Cabinet is in itself a very important

¹⁰ This Report came into my hands only yesterday. I have not yet read the whole of it. The article was in substance written before I received it.

fact. Wise and temperate men have recently been asking, Does not England for the conduct of a great war need a Dictator? The existence of the new Cabinet shows the method by which, without the passing of any Act of Parliament, or any revolutionary change, a virtual dictatorship may be created under the English Constitution.

As to the future and possible effects. It is certain that the existence of the War Cabinet — I had almost said that the circumstances of the time — demand a re-adjustment of our governmental machinery and also of many of our governmental conventions.¹¹ There is every reason to believe that the members of the Cabinet, and the very eminent men such as the Lord Chancellor, Mr. Balfour, Mr. Chamberlain, Sir Edward Carson, who stand outside the Cabinet, will loyally and cordially give full support and aid to the Cabinet. Yet certainly some understanding must gradually be formed as to the exact relation between the members of the Ministry and the members of the Cabinet. One is happy to perceive that the Prime Minister acknowledges this necessity, but that he thinks from experience that it can easily be met.¹² He is probably right. The mutual goodwill of Ministers whether within or without the Cabinet, and the common patriotism of all British statesmen are the best guarantee that the perplexities of a new form of government will not be allowed to frustrate the success longed for by the nation of a great constitutional experiment.

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¹¹ It is difficult to see how a Cabinet which also constitutes a war committee will be able to combine the secrecy of Cabinet meetings where no written note of its proceedings is taken, except by the Prime Minister, and that for the information of the King, with the use of a Secretary who, as I understand, has kept a record of what passed at the meetings of former war committees.

¹² See speech of the Prime Minister, Parliamentary Debates of 19th Dec., 1916, col. 1334.